

No. 45088-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Jeffrey Sitton,**

Appellant.

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Lewis County Superior Court Cause No. 13-1-00231-5

The Honorable Judge Richard L. Brosey

**Appellant's Opening Brief**

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### **ISSUES AND ASSIGNMENTS OF ERROR**

1. The prosecutor committed misconduct that was flagrant and ill-intentioned.
2. The prosecutor misstated the law and misled the jury during closing argument.
3. The prosecutor improperly argued that anyone who “can exercise dominion and control” over a controlled substance is guilty of possession.

**ISSUE 1:** To prove constructive possession of a controlled substance, the prosecution must establish that the accused person had dominion and control over the substance. Here, the prosecutor improperly argued that conviction attaches to anyone who *can* exercise dominion and control. Did the prosecutor commit reversible misconduct by misstating the law and misleading the jury during closing arguments?

4. The evidence was insufficient to prove that Mr. Sitton unlawfully possessed methamphetamine.
5. The prosecution failed to prove that Mr. Sitton possessed a sufficient quantity of methamphetamine to warrant a felony conviction.

**ISSUE 2:** Appellate courts have the authority to recognize non-statutory elements where a criminal statute is unconstitutional or unduly harsh. Washington’s statute criminalizing simple possession is unduly harsh; Washington is the only state that allows a felony conviction for residue possession (without proof of knowledge). Should the Court of Appeals exercise its authority to recognize a non-statutory element requiring proof of a sufficient quantity of drugs to warrant a felony conviction?

**ISSUE 3:** To convict Mr. Sitton of simple possession, the prosecution should have been required to prove that he possessed a sufficient quantity of drugs to warrant a felony charge. At trial, the evidence established only that he

possessed methamphetamine residue. Was the evidence insufficient to warrant conviction of a felony?

6. The sentencing court erred by imposing attorney fees as part of Mr. Sitton's sentence.
7. The imposition of attorney fees exceeded the sentencing court's statutory authority.
8. The sentencing court's imposition of attorney's fees infringed Mr. Sitton's Sixth and Fourteenth Amendment right to counsel.
9. The court erred by finding that Mr. Sitton has the present or future ability to pay his legal financial obligations.
10. The trial court erred by ordering Mr. Sitton to pay a \$500 contribution to the "Lewis County drug fund."

**ISSUE 4:** A court's statutory authority to impose costs is limited to "expenses specially incurred by the state in prosecuting the defendant" and does not extend to "expenses inherent in providing a constitutionally guaranteed jury trial." The court ordered Mr. Sitton to pay attorney fees as part of his judgment and sentence. Did the court exceed its statutory authority?

**ISSUE 5:** A court may not order an accused person to pay the costs of court-appointed counsel without first determining that s/he has the present or future ability to pay. The court ordered Mr. Sitton to pay the cost of his public defender without first inquiring into his ability to pay. Did the court impermissibly chill Mr. Sitton's Sixth and Fourteenth Amendment right to counsel?

**ISSUE 6:** No statute authorizes a court to order payment into a "drug fund." Here, the court ordered Mr. Sitton to pay \$500 to the Lewis County drug fund. Did the court exceed its statutory authority?

**ISSUE 7:** Illegal or erroneous sentences may be corrected at any time. Here, Mr. Sitton did not object to the imposition of unauthorized costs and fees at sentencing. Should the Court of

Appeals correct his illegal or erroneous sentence despite the absence of an objection in the trial court?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Jeffrey Sitton lived in an apartment in a garage. RP 28, 42. Mr. Sitton used heroin in his apartment, as did others, including his girlfriend Carlana Anderson. RP 36, 118-120, 123. While Anderson didn't live there at the time, a friend of Mr. Sitton's did. RP 61, 89, 117. People came to the building and used heroin, methamphetamine, and marijuana. RP 34, 37, 119-121, 123, 130.

Officer Haggerty knocked on the garage door to talk to Mr. Sitton and to find out if a person with a warrant was inside.<sup>1</sup> Mr. Sitton came out, and spoke with the officer about his drug use. RP 32, 35-36. The officer asked him to gather all of the drug paraphernalia from the garage structure and bring it out so they could destroy it. Haggerty believed that since Mr. Sitton was cooperative and forthcoming about his own drug use, he would be a good confidential informant. RP 33, 39.

Mr. Sitton gathered up items, put them in a container and brought them to the officer. RP 37-38, 45-48. Most of the items were destroyed, but not all of them. A pipe used to smoke methamphetamine was kept,

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<sup>1</sup> Officer Haggerty was also investigating an Xbox theft, for which Mr. Sitton was not a suspect. Anderson's sisters were suspected in that theft. RP 26-27, 33.

and eventually tested, as was an item with heroin residue. RP 38-40, 63-77. Both items contained only residue. RP 63-77; Ex 3.

After eight months, Mr. Sitton had not made an agreement to work as an informant. RP 39. The state filed charges against him of possession of heroin and possession of methamphetamine.<sup>2</sup> CP 1-2.

Mr. Sitton testified at trial, admitting his addiction to heroin. RP 117-140. He told the jury that the two items that were tested by the lab and that formed the bases for the charges were not his. RP 120-121, 123-127, 133-134. Haggerty confirmed that he had no reason to think Mr. Sitton used methamphetamine. RP 55.

The court defined possession for the jury. CP 18. The instruction included the following language:

Constructive possession occurs when there is no actual possession but there is dominion and control over the substance. Proximity alone without proof of dominion and control is insufficient to establish constructive possession...  
CP 18.

The court also instructed jurors that “[p]assing control or momentarily handling the drugs is not sufficient to establish dominion and control.” CP 19.

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<sup>2</sup> Anderson was also charged. CP 1.

During closing argument, the state urged conviction based on its view of constructive possession:

You can't own drugs, because they are illegal. As long as you know they are there and you can exercise dominion and control, guess what? You're guilty. Even if you didn't intend to use those drugs, hadn't used those drugs, if you know they are there and you know what they are, you are guilty as long as you can exercise dominion and control.  
RP 181.

Mr. Sitton was convicted as charged. CP 27-37. The court issued assessments including attorney's fees of \$1800 and a "drug fund" contribution of \$500. Mr. Sitton timely appealed. CP 27-37, 40-51.

## **ARGUMENT**

### **I. PROSECUTORIAL MISCONDUCT DENIED MR. SITTON A FAIR TRIAL.**

#### **A. Standard of Review**

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Absent an objection, a court can consider prosecutorial misconduct for the first time on appeal, and must reverse if the misconduct was flagrant and ill-intentioned. *Id.*

Furthermore, an appellant can argue prosecutorial misconduct for the first time on review if it creates manifest error affecting a

constitutional right. RAP 2.5(a)(3). A reviewing court analyzes the prosecutor's statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008).

- B. The prosecutor committed misconduct by mischaracterizing the law in closing argument.

Prosecutorial misconduct can deprive the accused of a fair trial. *Glasmann*, 175 Wn.2d at 703-04; U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3-5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

An accused person is denied a fair trial when the prosecutor mischaracterizes the law, if there is a substantial likelihood that the mischaracterization affected the jury verdict. *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 164 Wn.2d 724, 295 P.3d 728 (2012).<sup>3</sup> A prosecutor's misstatement of the law is "a serious irregularity having the grave potential to mislead the jury." *Id.*

The state can demonstrate constructive possession of a controlled substance by showing that the accused exercised dominion and control over the drug. *State v. Shumaker*, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007). Dominion and control over the premises where the drug is found is not sufficient to prove constructive possession. *Id.*

At trial, the prosecutor argued in closing that the state did not have to prove that Mr. Sitton actually exercised dominion and control over the drugs in order for the jury to convict. The state claimed that a person "can't own drugs, because they are illegal." RP 181. The prosecutor told the jury a person who knows an item is present, and can exercise dominion and control, then "[G]uess what? You're guilty." RP 181. He finished his thought with this:

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<sup>3</sup> In an unpublished decision, the Court of Appeals affirmed its prior decision on remand.

Even if you didn't intend to use those drugs, hadn't used those drugs, if you know they are there and you know what they are, you are guilty as long as you can exercise dominion and control. RP 181.

The prosecutor's argument mischaracterized the law. *Shumaker*, 142 Wn. App. at 334. Evidence that Mr. Sitton could have exercised dominion and control over the drugs was not sufficient to prove constructive possession. *Id.* Such an argument is equivalent to saying that the fact that the drugs were found in Mr. Sitton's home was enough to convict him of possession. The prosecutor's argument was improper. *Walker*, 164 Wn. App. at 736.

Mr. Sitton was prejudiced by the prosecutor's mischaracterization of the law. The only issue at trial was whether the fact that the drugs were in Mr. Sitton's home proved that he possessed them. Rather than argue that the evidence suggested that Mr. Sitton exercised dominion and control over the substances, the prosecutor misstated the law and told the jury that the fact that he had the opportunity to exercise dominion and control was enough to convict him. There is a substantial likelihood that the prosecutor's mischaracterization of the law of constructive possession affected the verdict. *Walker*, 164 Wn. App. at 736.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by mischaracterizing the law in closing argument. *Id.* Mr. Sitton’s convictions must be reversed. *Id.*

**II. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. SITTON  
BASED ON POSSESSION OF MERE DRUG RESIDUE.**

**A. Standard of Review.**

Constitutional questions are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 702, 257 P.3d 570 (2011). The interpretation of a statute is reviewed *de novo*, as is the application of law to a particular set of facts. *State v. Budik*, 173 Wn.2d 727, 733, 272 P.3d 816 (2012); *In re Detention of Anderson*, 166 Wn.2d 543, 555, 211 P.3d 994 (2009).

**B. The court should use its common-law authority to recognize a non-statutory element in simple possession cases, allowing a felony conviction only if the prosecution proves possession of some minimum quantity of a controlled substance.**

The legislature has explicitly authorized the judiciary to supplement penal statutes with the common law, so long as the court decisions are “not inconsistent with the Constitution and statutes of this state...” RCW 9A.04.060. Washington courts have the power to recognize non-statutory elements of an offense.<sup>4</sup> For example, the Supreme Court has recognized non-

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<sup>4</sup> In fact, the judiciary has the power to define crimes where necessary. *See State v. Chavez*, 163 Wn.2d 262, 180 P.3d 1250 (2008) (upholding judicially created definition of assault against a separation of powers challenge). Similarly, the judiciary has the power to

statutory elements in robbery cases and cases involving controlled substances. *In re Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); *State v. Goodman*, 150 Wn.2d 774, 786, 83 P.3d 410 (2004); *State v. Johnson*, 119 Wn.2d 143, 145, 829 P.2d 1078 (1992).

Possession of a controlled substance is a strict liability offense. *State v. Denny*, No. 42447-9-III, 294 P.3d 862 (Feb. 20, 2013). Under current law, as interpreted by the Court of Appeals, a person may be convicted of a felony for possessing the smallest quantity of drug residue. RCW 69.50.4013; *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008) (“[T]here is no minimum amount of drug which must be possessed in order to sustain a conviction.”).

Thus in Washington, guilt is a function of the sensitivity of equipment used to detect controlled substances, rather than the culpability of the individual. Thus, a person who visits Washington from Florida would likely be guilty of cocaine possession upon arrival. *See, e.g., Lord v. Florida*, 616 So.2d 1065, 1066 (1993) (“It has been established by toxicological testing that cocaine in South Florida is so pervasive that microscopic traces of the drug can be found on much of the currency circulating in the area.”) Of course,

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recognize affirmative defenses to ameliorate the harshness of criminal statutes. *See, e.g., State v. Cleppe*, 96 Wn.2d 373, 381, 635 P.2d 435 (1981) (recognizing the judicially created affirmative defense of unwitting possession).

such a person could assert the affirmative defense of unwitting possession, and might achieve acquittal by convincing jurors that s/he knew nothing of the cocaine residue clinging to her or his currency (or other property). *Cleppe*, 96 Wn.2d at 381.

In most states, conviction for possession of residue is either disallowed or established only upon proof of knowing possession.<sup>5</sup> *See, e.g., Costes v. Arkansas*, 287 S.W.3d 639 (2008) (Possession of residue insufficient for conviction); *Doe v. Bridgeport Police Dept.*, 198 F.R.D. 325 (2001) (possession of used syringes and needles with trace amounts of drugs is not illegal under Connecticut law); *California v. Rubacalba*, 859 P.2d 708 (1993) (“Usable-quantity rule” requires proof that substance is in form and quantity that can be used); *Louisiana v. Joseph*, 32 So.3d 244 (2010) (Cocaine residue that is visible to the naked eye is sufficient for conviction if requisite mental state established; statute requires proof that defendant “knowingly or intentionally” possessed a controlled substance); *Finn v. Kentucky*, 313 S.W.3d 89 (2010) (possession of residue sufficient because prosecution established defendant’s knowledge); *Hudson v. Mississippi*, 30 So.3d 1199,

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<sup>5</sup> One exception is North Dakota, which permits conviction for willfully possessing residue. *State v. Christian*, 2011 ND 56, 795 N.W.2d 702, 705 (2011). In North Dakota, willfulness is defined to include recklessness. N.D. Cent. Code. § 12.1-02-02.

1204 (2010) (possession of a mere trace is sufficient for conviction, if state proves the elements of “awareness” and “conscious intent to possess”); *Missouri v. Taylor*, 216 S.W.3d 187 (2007) (residue sufficient for conviction if defendant’s knowledge is established); *North Carolina v. Davis*, 650 S.E.2d 612, 616 (2007) (residue sufficient if knowledge established); *Head v. Oklahoma*, 146 P.3d 1141 (2006) (knowing possession of residue established by defendant’s statement); *Ohio v. Eppinger*, 835 N.E.2d 746 (2005) (state must be given an opportunity to prove knowing possession, even of a “miniscule” amount of a controlled substance); *Hawaii v. Hironaka*, 53 P.3d 806 (2002) (residue sufficient where knowledge is established); *Gilchrist v. Florida*, 784 So.2d 624 (2001) (immeasurable residue sufficient for conviction, where circumstantial evidence establishes knowledge); *New Jersey v. Wells*, 763 A.2d 1279 (2000) (residue sufficient; statute requires proof that defendant “knowingly or purposely” obtain or possess a controlled substance); *Idaho v. Rhode*, 988 P.2d 685, 687 (1999) (rejecting “usable quantity” rule, but noting that prosecution must prove knowledge); *Lord*, 616 So.2d 1065 (mere presence of trace amounts of cocaine on circulating currency insufficient to support felony conviction); *Garner v. Texas*, 848 S.W.2d 799, 801 (1993) (“When the quantity of a substance possessed is so small that it cannot be quantitatively measured, the State must produce evidence that the defendant knew that the substance in his possession was a

controlled substance”); *South Carolina v. Robinson*, 426 S.E.2d 317 (1992) (prosecution need not prove a “measurable amount” of controlled substance, so long as knowledge is established). For at least one state, knowingly and unlawfully possessing mere residue is a misdemeanor, rather than a felony. *New York v. Mizell*, 532 N.E.2d 1249, 1251 (1988).

The judiciary should employ its inherent authority to recognize non-statutory elements and recognize a minimum quantity required for conviction of simple possession.<sup>6</sup> *Goodman*, 150 Wn.2d 774; *Cleppe*, 96 Wn.2d 373; *Chavez*, 163 Wn.2d 262. A common law element requiring proof of a minimum quantity is not inconsistent with Washington’s possession statute.<sup>7</sup> RCW 69.50.4013.

If the court declines to recognize a non-statutory element requiring proof of some minimum quantity, Washington will be the only state in the nation imposing felony sanctions for possession of residue absent proof of a culpable mental state. This unduly harsh result requires an expensive commitment of judicial resources, prosecution and defense costs, and the cost

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<sup>6</sup> The Supreme Court has rejected a “usable quantity” test, but has never upheld a conviction based on possession of mere residue. *See State v. Larkins*, 79 Wn.2d 392, 395, 486 P.2d 95 (1971) (affirming conviction based on “a measurable amount” of Demerol.)

<sup>7</sup> By contrast, some states specifically criminalize the knowing possession of even the smallest amount of a controlled substance. *See, e.g.*, KRS §218A.1415, which permits conviction for knowing possession of “*any quantity* of methamphetamine...” (emphasis added).

of incarceration. It is bad policy, especially in light of the current fiscal climate.

The only Washington cases examining the issue have concluded that the statute does not *require* proof of a minimum quantity. *State v. Smith*, 29832–9–III, 298 P.3d 785 (2013); *State v. Bennett*, 168 Wn. App. 197, 210, 275 P.3d 1224 (2012). Neither *Smith* nor *Bennett* considered the advantages and disadvantages of exercising common law authority to recognize a non-statutory element of the offense.

Nothing in Washington’s statute is inconsistent with requiring proof of a minimum quantity, in order to obtain a felony conviction for simple possession.<sup>8</sup> To convict a person of simple possession under RCW 69.50.4013, the prosecution should be required to prove some quantity beyond mere residue. In light of *Larkins*, it need not be a usable quantity, but it should be at least a measurable amount. If such a common-law element is not recognized, Washington will be the only state in the nation that permits conviction of a felony for possession of residue, without proof of knowledge.

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<sup>8</sup> In some states, for example, the statute permits conviction if a person knowingly possesses “any quantity” or “any amount” of a controlled substance. *See, e.g.*, KRS §218A.1415 (“A person is guilty of possession of a controlled substance in the first degree when he knowingly and unlawfully possesses: a controlled substance that contains *any quantity* of methamphetamine...”) (emphasis added).

- C. Mr. Sitton's possession of mere residue did not justify felony convictions.

Mr. Sitton's convictions were based on possession of mere residue.

The state's witnesses only claimed that Mr. Sitton had possessed paraphernalia with drug residue on it. RP 38, 68-69, 75, 86; Ex 3. No witness testified that he possessed a discernible amount of any drug. RP 24-95.

If the court recognizes a non-statutory element requiring proof of some minimum quantity beyond mere residue, Mr. Sitton's possession convictions would be based on insufficient evidence, in violation of his right to due process. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). The court should recognize such an element, reverse Mr. Sitton's convictions, and dismiss the charges with prejudice. *Id.*

**III. THE COURT ERRED BY ORDERING MR. SITTON TO PAY THE COST OF HIS COURT-APPOINTED ATTORNEY AND A CONTRIBUTION TO THE LEWIS COUNTY DRUG FUND.**

- A. Standard of Review

Reviewing courts assess questions of law and constitutional challenges *de novo*. *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013). Illegally imposed costs and fees can be challenged for the first

time on review. *State v. Calvin*, --- Wn. App. ---, 316 P.3d 496 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013).

B. The court lacked the authority to order Mr. Sitton to pay the cost of his court-appointed counsel.

A court's authority to impose costs derives from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied*, 172 Wn.2d 1021, 268 P.3d 224 (2011).<sup>9</sup> The court may order an offender to pay "expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). The court may not order an offender to pay "expenses inherent in providing a constitutionally guaranteed jury trial." RCW 10.01.160(2).<sup>10</sup>

The trial court exceeded its authority by requiring Mr. Sitton to pay \$1800 in attorney fees. CP 31.

First, nothing in the statute specifically authorizes imposition of costs for counsel.<sup>11</sup> Second, the costs of counsel were not "specially

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<sup>9</sup> See also *State v. Bunch*, 168 Wn. App. 631, 279 P.3d 432 (2012); *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812 (2013) *review denied*, 177 Wn.2d 1021, 304 P.3d 115 (2013).

<sup>10</sup> Nor may the court order payment of "expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law." RCW 10.01.160. Here, the record does not indicate whether or not defense counsel belonged to a public defense agency funded in a manner unrelated to specific violations of law.

<sup>11</sup> RCW 9.94A.030(3) defines "legal financial obligation" to include numerous items, including, *inter alia*, "court-appointed attorneys' fees." However, the statute does not

incurred by the state in prosecuting” Mr. Sitton. RCW 10.01.160(2).

Third, the cost of counsel inhered in the expense required to provide a constitutionally guaranteed jury trial. RCW 10.01.160(2).

For these reasons, the attorney fee assessment must be vacated, and the case remanded for correction of the judgment and sentence. *Hathaway*, 161 Wn. App. at 651-653.

- C. The court violated Mr. Sitton’s right to counsel by ordering him to pay the cost of his court-appointed attorney without first inquiring into whether he had the present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused’s exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Under *Fuller*, the court must assess the accused person’s current or future ability to pay prior to imposing costs. *Id.*

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court’s authority to order an offender to pay the costs of prosecution:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount

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purport to authorize imposition of such fees as part of an offender’s sentence. The other items included in the definition—such as restitution and fines—are authorized elsewhere in the Revised Code.

and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.<sup>12</sup> *Fuller*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay them.'" *Id.* The court noted that, under the Oregon scheme, "no requirement to repay may be imposed if it appears *at the time of sentencing* that 'there is no likelihood that a defendant's indigency will

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<sup>12</sup> In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed for an indigent defendant.

end.” *Id.* (emphasis added). Accordingly, the court found that “the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation.... [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship.” *Id.*

Oregon’s recoupment statute did not impermissibly chill the exercise of the right to counsel because “[t]hose who remain indigent or for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to repay”. *Fuller*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to hold that the Sixth Amendment requires a court to find that the offender has the present or future ability to repay the cost of court-appointed counsel before ordering him/her to do so.<sup>13</sup>

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<sup>13</sup> See e.g. *State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) (“A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment”); *State v. Temmin*, 674 N.W.2d 403, 410-11 (Minn. 2004) (“The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney's fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns *Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

The court did not find that Mr. Sitton had the present or future ability to pay the cost of his court-appointed attorney. CP 27-37. The order that Mr. Sitton pay attorney's fees violated his right to counsel and must be vacated. *Fuller*, 417 U.S. at 53.

D. The court lacked authority to order Mr. Sitton to pay \$500 into the Lewis County Drug Fund.

The court ordered Mr. Sitton to pay \$500 into the "Lewis County Drug Fund." CP 31. No statute authorizes such an order.<sup>14</sup> The court

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be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn.Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions"); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) ("In view of *Fuller*, we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute").

<sup>14</sup> RCW 9.94A.030(3) defines "legal financial obligation" to include, *inter alia*, "county or interlocal drug funds." The statute does not purport to authorize imposition of such fees as part of an offender's sentence. As noted above, imposition of the other items included in the definition—such as restitution and fines—are authorized elsewhere in the Revised Code.

exceeded its authority by ordering Mr. Sitton to pay this fee. *Hathaway*, 161 Wn. App. 651-653.

The order compelling Mr. Sitton to pay into the “Lewis County Drug Fund” must be vacated. *Id.*

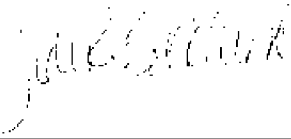
### **CONCLUSION**

The prosecutor committed flagrant and ill-intentioned misconduct by mischaracterizing the law in closing argument. There was insufficient evidence to convict Mr. Sitton of felony possession based on possession of residue alone. Mr. Sitton’s convictions must be reversed.

The court ordered Mr. Sitton to pay the cost of his court-appointed attorney in violation of his right to counsel. The court also ordered him to pay into the Lewis County Drug Fund, which is not authorized by statute. The court’s legal financial obligation orders must be vacated.

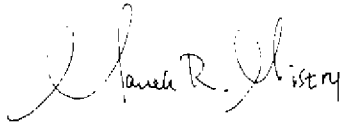
Respectfully submitted on February 6, 2014,

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## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jeffrey Sitton  
823 Wayne Drive  
Centralia, WA 98531

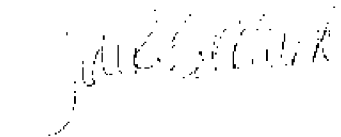
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney  
appeals@lewiscountywa.gov  
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 6, 2014.



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Jodi R. Backlund, WSBA No. 22917  
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# BACKLUND & MISTRY

**February 06, 2014 - 3:34 PM**

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